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IN THE

Supreme Court of the United States.

October Term, 1949.

No. .

AMERICAN EASTERN CORPORATION,

Petitioner,

v.

JEREMIAH McCARTHY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of American Eastern Corporation respectfully prays that this Court shall grant a writ of certiorari to the United States Court of Appeals for the Third Circuit which affirmed a judgment entered upon the verdict of the jury in the United States District Court for the Eastern District of Pennsylvania. The judgment was entered against your Petitioner in favor of the Respondent in the sum of $22,500.00 for damages sustained by the Respondent as the result of personal injuries sustained by him on board the Petitioner's Motor Vessel "Gadsden" on June 16, 1947.

STATEMENT OF THE CASE.

The Respondent, McCarthy, was employed by your Petitioner as a member of the crew of the Motor Vessel "Gadsden". He was entering one of the holds of the vessel from its main deck. To do so required him to descend a ladder. There was a refrigerator door near the ladder which could not be fully opened with the ladder in place. The ladder, therefore, was constructed so that one section of it could be detached and removed. At the time of the accident in this case, the section of ladder had been removed and not replaced. Respondent attempted to make his way past this gap by climbing onto the refrigerator door, using its handles for footholds. In so doing, he fell and sustained injuries.

The Respondent instituted suit against the Petitioner in the District Court. The case proceeded to trial and was submitted to the jury in a charge which permitted the jury to find in favor of the Respondent on two grounds. The first was negligence under the Jones Act, 46 U. S. C. A. 688. The second was on the so-called doctrine of "unseaworthiness" under the General Maritime Law.

The Petitioner took exception to the charge and requested that the Court require the Respondent to elect between his remedy for negligence under the Jones Act and his remedy under the General Maritime Law for unseaworthiness. The District Judge refused to compel the Respondent to elect. Instead, he submitted the case to the jury in a charge which told the jury it could find in favor of the Respondent if it found either that the vessel was unseaworthy or that the fellow servants of the Petitioner had been negligent. The jury returned a verdict against the Petitioner and in favor of the Respondent in the sum of $22,500.00.

The District Court denied Petitoner's motion for a new trial. The Court of Appeals for the Third Circuit affirmed the judgment, relying upon its own earlier de-

cision in *German v. Carnegie Illinois Steel Corporation*, 156 F. 2nd 977. It is the correctness of the *German* decision as well as the present decision which is now questioned by Petitioner.

JURISDICTION.

The jurisdiction of this Court to entertain the present petition and to grant the same is provided by Section 1254 of Title 28, U. S. Code.

QUESTION PRESENTED.

In a suit by a seaman against his employer, is the seaman required to elect between his rights under the General Maritime Law to recover for unseaworthiness and his rights under the Jones Act, 46 U. S. C. A. 688?

OPINIONS BELOW.

The District Court, Judge Frederick V. Follmer, filed no opinion. He merely entered an order denying the Petitioner's motion for a new trial. The opinion of the Court of Appeals, — F. 2nd —, is not reported as of the time this petition is prepared.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. The Court of Appeals has decided an important question involving the construction of a Federal Statute, the Jones Act, in a manner which is important in the field of Maritime Law.

2. The Court of Appeals has decided the question in a manner which is in direct conflict with decisions by the Court of Appeals for the Second Circuit and with decisions by various District Courts. The decision of the Court of Appeals is also in direct conflict with decisions by State Courts, the most recent being a decision by the Superior Court of California in 1948.

Compare the decision in the case at Bar and the earlier decision by the same Court in *German v. Carnegie Illinois Steel Corporation, supra,* with *Skolar v. Lehigh Valley R. Co.,* 62 F. 2nd 893 (C. A. 2); *McGhee v. United States,* 165 F. 2nd 287 (C. A. 2); *Gambera v. SS "Emmy", et al.,* 1940 A. M. C. 834 reversed on other grounds, 123 F. 2nd 414; *Sellon, Admx. v. Great Lakes Transit Corporation,* 87 F. 2nd 708; *The Liberty Bell,* 105 F. 2nd 604; *Vargas v. Pope and Talbot, Inc.,* 1948 A. M. C. 904 (Superior Ct. Calif.); *Wilkins v. Foss Launch and Tug Company,* 1944 A. M. C. 759 (Wash. Sup. Ct., 1944).

3. The Court of Appeals has decided an important question of Maritime Law in a way which is clearly in conflict with decisions by this Court. The Court of Appeals in its opinion has said that the earlier holdings by this Court were merely obiter dicta. We disagree. Compare the decision in the present case with *Panama R. Co. v. Johnson,* 264 U. S. 375; *Pacific S. S. Co. v. Peterson,* 278 U. S. 130; *Engel v. Davenport,* 271 U. S. 33; *Panama R. Co. v. Vasquez,* 271 U. S. 577; *The Arizona v. Anelich,* 298 U. S. 110; *United States v. Oregon,* 260 U. S. 290. See Brief in support of this petition, post.

To these decisions by this Court should be added the following decisions by inferior Courts in which the language and rationale are directly contrary to the holding by the Court of Appeals in the case at Bar. *Smith v. Lykes Bros.—Ripley SS Co.,* 105 F. 2nd 604; *McDonald v. Cape Cod Trawling Corporation,* 71 F. Supp. 888; *Keefe v. Matson Navig. Co.,* 46 F. 2nd 124; *Hammond Lumber Co. v. Sandin,* 17 F. 2nd 760; *Burkholder v. United States,* 60 F. Supp. 700.

4. The Court of Appeals in refusing to compel "election" between unseaworthiness and negligence has destroyed any opportunity to bring uniformity between the

remedies which are available to seamen in State Courts and in Federal Courts. The Court of Appeals recognizes (slip opinion P. 5-6) that an action for negligence based upon the Jones Act does not require diversity of citizenship to enable a seaman to bring it in a Federal Court, whereas to base his cause of action upon unseaworthiness in a Federal Court, the seaman had to invoke diversity jurisdiction. Thus, a seaman who desires to sue in a State Court [1] may try his claim for negligence there but the shipowner can remove to the Federal Court a cause of action based upon unseaworthiness if diversity of citizenship exists.

Conversely, if the seaman sues in a District Court but does not lay his venue in accordance with the Jones Act [2] that Court may try only the cause of action based upon unseaworthiness.

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1. Many seamen do choose a State Court as their forum. This is probably dependent upon Counsel's judgment that the verdict there may be larger than in the Federal Court in the same State. In New York many cases having their roots in matters maritime are tried in State Courts. Cf. *Caldarola v. Eckert,* 322 U. S. 155. In Pennsylvania some are, cf. *Garrett v. Moore-McCormack Lines, Inc.,* 317 U. S. 239, but the majority are tried in the Federal Court. In New Jersey they are practically all tried in State Courts. On the West Coast, it would seem that the State Courts are used more frequently than Federal Courts, cf. *Hust v. Moore-McCormack Lines, Inc.,* 328 U. S. 707, *Fink v. Shepherd Steamship Co.,* decided by this Court on June 27, 1949. These observations cannot apply, of course, to suits against the United States and we have referred only to those cases which have been before this Court. No accurate survey is possible in the time available.

It is an interesting but unexplained fact that there is very frequently a wide disparity between the amounts awarded by juries in State and Federal Courts sitting in the same locality.

2. "Jurisdiction in such actions shall be under the Court of the district in which the defendant employer resides or in which his principal office is located." 46 U. S. C. A. 688.

The Court of Appeals seems to recognize this lack of uniformity but justifies it on the ground that election is a harsh doctrine. We submit that it is the doctrine which Congress wrote into the Jones Act and the only one which, if enforced, will bring to the field of maritime personal injury litigation the identity of outcome between cases tried in State and Federal Courts which this Court has said should be achieved. See the line of cases commencing with *Erie R. Co. v. Tompkins*, 304 U. S. 64.

5. We suggest that the Court below was led into error by following the rule which was promulgated by this Court in *Southern Pacific Co. v. Jensen*, 244 U. S. 205. The Court below enforces, in a common law Court, a doctrine rooted in the Admiralty or Maritime Law. That is the result of following the uniformity doctrine promulgated in the *Jensen* case and other cases following it, such as *Chelentis v. Luckenbach Steamship Company, Inc.*, 247 U. S. 372.

Carried to its logical conclusion, the *Jensen* doctrine is in irreconcilable conflict with this Court's decision in *The Moses Taylor*, 71 U. S. 411. That case holds that "it is not a remedy in the common law Courts which is saved, but a common law remedy". In spite of that holding, the *Jensen* doctrine has led to the enforcement of maritime remedies in common law Courts. This Court has recently noted the problem. The divergent views are expressed in *Caldarola v. Eckert*, 322 U. S. 155. Compare the language of Mr. Justice Frankfurter, speaking for the majority, at Page 157 of the Caldarola opinion with the language of Mr. Justice Rutledge, dissenting, at Pages 163, 164.

We know of no decision by this Court which has been questioned and criticized as much as the *Jensen* decision unless it be *Swift v. Tyson*. Jensen is the *Swift v. Tyson* of maritime litigation. We respectfully suggest that this Court should reconsider the doctrine of the *Jensen* case, overrule it and bring to the Maritime Law that uniformity which *Erie R. v. Tompkins* brought to law and equity.

The instant case is an appropriate one in which to review the *Jensen* doctrine because the entire basis of the enforcement of the right to recover for unseaworthiness in a common law action is dependent upon the uniformity rule announced in the *Jensen* case.

It is submitted that the instant case merits review by this Court and that certiorari should be granted.

Respectfully submitted,

AMERICAN EASTERN CORPORATION,
Petitioner,

By THOMAS E. BYRNE, JR.,
Counsel for Petitioner.

TIMOTHY J. MAHONEY, JR.,
MARK D. ALSPACH,
KRUSEN, EVANS AND SHAW,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

A statement of the case has been made in the Petition. Bearing in mind the injunction of Rule 38 that the brief be direct and concise, it is not repeated here.

ARGUMENT.

As counsel for the Petitioner understands the function of a brief in support of a petition for certiorari, it is to convince this Court that the petition should be granted. We do not comprehend that its function includes an argument on the merits. This brief will be presented accordingly.

I. There Is Conflict Between the Circuits.

The Merchant Marine Act of 1920, hereafter referred to as the Jones Act,[3] provides as follows:

> "Any seaman who shall suffer personal injuries in the course of his employment may, *at his election,* maintain an action for damages at law, . . .". (Emphasis ours.)

In the Opinion of the Court of Appeals in the case at bar it is noted that the Court of Appeals for the Second Circuit has reached a different result on the question of what the "election" is. In the case at bar the Court below said that:

> "The election to which the Jones Act refers is an election of remedies as between a suit in admiralty and a civil action."

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3. 46 U. S. C. A. 688.

It therefore approved the action of the District Court in refusing to compel an election between rights founded upon unseaworthiness and rights founded upon negligence under the Jones Act. It approved instructions to the jury which permitted a finding of liability if the jury found either unseaworthiness or negligence or both.

In *Skolar v. Lehigh Valley R. Co.*, 60 F. 2nd 893, the Court of Appeals for the Second Circuit had before it an appeal by a seaman-plaintiff. There the District Court (at 894)

> ". . . struck out the allegations of the complaint relating to unseaworthiness, on the ground that plaintiff was required to elect between rights under the statute and those under the former maritime law."

The Court of Appeals affirmed that ruling by the District Court and said at page 894:

> "If he may present both bases for recovery in the same suit, we are unable to see wherein the statutory right is an alternative to the right to indemnity existing under the old maritime rules, or wherein he has been required to elect between the 'two inconsistent remedies'."

As recently as 1947 the Court of Appeals for the Second Circuit has reaffirmed the position it took in the *Skolar* case, *supra*. In *McGhee v. United States*, 165 F. 2nd, 287 at 290, it said:

> "We do not mean that a seaman may go to trial on both causes of action simultaneously, and recover upon one or the other as the evidence turns out; we said the opposite in *Skolar v. Lehigh Valley R. Co.*"

The decision by the Court of Appeals is squarely in conflict with the decision in *Vargas v. Pope & Talbot, Inc.*, 48 A. M. C. 904 (Sup. Ct., Cal.). In that case the State Court noted the earlier decision by the Court of Appeals for the Third Circuit in *German v. Carnegie-Illinois Steel*

Corporation, 156 F. 2nd 977. Nevertheless, it held, at page 906, that:

> "An election is required. The Court of Appeals in the Carnegie-Illinois decision does not consider or attempt to analyze any of the cases decided in the Supreme Court recognizing the duty of election nor attempt to differentiate them in any way."

In *Burkholder v. United States*, 60 F. Supp. 700, at 701, Judge Kirkpatrick said:

> ". . . the law is not susceptible of the interpretation that a seaman may bring an action under the Jones Act and, if it is decided against him, follow up with a second one under the general law of maritime tort. If he could do that he would unquestionably be having the benefit of both remedies. To so hold would amount to construing the 'election' required by the statute as no more than a provision against double recovery for one injury, . . .".

II. The Decision Below Is in Conflict With Prior Decisions by This Court.

> "The right to recover compensatory damages under the new rule for injuries caused by negligence is, however, an alternative of the right to recover indemnity under the old rules on the ground that the injuries were occasioned by unseaworthiness; *and it is between these two inconsistent remedies for an injury, both grounded on tort, that we think an election is to be made* under the maritime law as modified by the statute." *Pacific S. S. Co. v. Peterson*, 278 U. S. 130 at 138. (Emphasis ours.)

> "Seamen may invoke, at their election, the relief accorded by the old rules against the ship, or that provided by the new against the employer. *But they may not have the benefit of both.*" *Plamals v. The Pinar Del Rio*, 277 U. S. 151 at 156-7. (Emphasis ours.)

In *Engel v. Davenport*, 271 U. S. 33 at 36 this Court said that the action was one founded upon the Jones Act

> ". . . in which the petitioner, instead of invoking, as he might, the relief accorded him by the old maritime rules, *has elected* to seek that provided by the new rules in an action at law based upon negligence." (Emphasis ours.)

The authorities such as *Robinson on Admiralty* and *Benedict on Admiralty* had considered the matter settled. See *Robinson on Admiralty*, page 335 et seq. and *Benedict on Admiralty*, (Sixth Edition) Vol. I, p. 46.

The Court of Appeals states that this Court's decision in *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316, leads it to a result which is in conflict with the above cited decisions by this Court and other Federal and State Courts. That statement will not stand analysis. The identical Court which decided the *Phillips* case had decided the *Peterson* case, *supra*, only seventeen months before. This Court saw no inconsistency between the two decisions because it recognized that Phillips's first suit based upon unseaworthiness constituted an election and the election was binding upon him no matter how unfortunate the result.

III. The Decision by the Court of Appeals in the Present Case Leads to Disparity in the Result as Between Cases Tried in State and Federal Courts.

A suit under the Jones Act may be brought in a Federal Court [4] if the venue is proper. If brought in a State Court, it is not subject to removal.[5] If a seaman chooses

4. "Jurisdiction in such actions shall be under the court of the district in which the defendant-employer resides or in which his principal office is located." 46 U. S. C. A. 688.

This is venue only. *Panama R. Co. v. Johnson*, 264 U. S. 375.

5. *Bainbridge v. Merchants' & Miners' Transp. Co.*, 287 U. S. 278.

to institute a suit in the State Court, as he may, and diversity of citizenship exists, as it usually does, the defendant may remove to the Federal Court so much of the suit as pertains to unseaworthiness but he may not remove that based upon the Jones Act. In that situation, of course, the seaman who tried his case in the State Court would not be entitled to proceed upon both Jones Act negligence and unseaworthiness under the law of maritime tort. It would be only where the plaintiff and defendant were both residents of the same state that a seaman-plaintiff could try both Jones Act negligence and unseaworthiness together in a State Court.

Conversely, if a seaman sues his employer in a Federal District Court but does not lay the venue as required by the Jones Act,[6] the employer may have stricken from the complaint all allegations claiming Jones Act negligence. Compare *Keefe v. Matson Nav. Co.* with *Mikkelson v. Pacific S. S. Co.*, reported together, 46 F. 2nd 123 and 124.

We submit that these two cases are correctly decided and yet they compel a different result from that which has been announced by the Court of Appeals in the present case.

If this is the proper state of the law with respect to seamen's claims for personal injury, then we can only conclude that "the accident of a suit by a non-resident litigant in a federal court instead of in a state court a block away" should lead to a substantially different result. This would of course be contrary to the policy announced by this Court in *Guaranty Trust Co. of New York v. York*, 326 U. S. 99.

IV. A Proper Solution of the Problem Requires a Reconsideration of the Doctrine of Southern Pacific Co. v. Jensen,[7] and Its Descendant, Chelentis v. Luckenbach S. S. Co.[8]

The doctrine of the *Jensen* case has been widely criticized. It has made of the maritime personal injury field a

6. See footnote 4.
7. 244 U. S. 205.
8. 274 U. S. 372.

wilderness in which the unwary may well become enmeshed. The *Jensen* doctrine is, we suggest, incorrect. It has become necessary to engraft upon it the shadowy "maritime but local" doctrine and it is not conducive to the result which was intended by the representatives of the Seamen's Union who introduced and pressed for passage of the Jones Act before Congress in 1920.

This Court has recently noted the divergent views. Compare the language of Mr. Justice Frankfurter, speaking for the majority, with the language of Mr. Justice Rutledge, dissenting, in *Caldarola v. Eckert,* 332 U. S. 155. It is the rule of the *Jensen* case which makes courts of admiralty of every common law court in which a seaman's claim is brought. These common law courts are really enforcing an admiralty remedy rather than a common law remedy. This is in spite of the injunction in *The Moses Taylor,* 71 U. S. 411, that:

> "It is not a remedy in the common law courts which is saved, but a common law remedy."

Following blindly the rule of the *Jensen* case, the Courts have jettisoned the admiralty law to the point where it appears to us that they are also jettisoning that portion of Article 3, Sec. 2 of the Constitution which extends to the United States "all cases of admiralty and maritime jurisdiction". If a seaman suing in a State court may try his suit on the theory of Jones Act negligence and unseaworthiness, then that State court is invading the maritime jurisdiction which the Constitution grants to United States Courts. This is so because it cannot be successfully argued that a right of action to recover damages by reason of unseaworthiness is a common law remedy. It is a remedy granted by the maritime law and not by the common law. It is being enforced in a common law court. This lies at the root of the divergent and often conflicting rights and remedies in the field of maritime personal injury remedies. See *The Tangled Seine,* 57 Yale Law Journal 253 (Dec. 1947).

The distinctions we draw are not merely theoretical. For example, the doctrine of unseaworthiness could not have been relied upon if this had been a suit against this Petitioner by reason of a death by wrongful act. The maritime law provides no remedy for death by wrongful act, the supreme personal injury. We submit that this is why Congress wrote the election provision into that section of the Jones Act which applied to personal injuries and omitted it in that section which granted a right of action for death. We submit that Congress was more logical than the Judiciary has been in its approach to the problem.

CONCLUSION.

We respectfully submit that this Court should grant certiorari, review the problems which this Petition presents, and reach a decision which will reflect the intention of Congress when it wrote the words of election into the Jones Act, and at the same time clarify the state of the law which has been filled with uncertainty since the *Jensen* decision. We submit that a return to fundamental principles is the solution. The writ should be granted.

Respectfully submitted,

THOMAS E. BYRNE, JR.,
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TIMOTHY J. MAHONEY, JR.,
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Of Counsel.

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IN THE

Supreme Court of the United States.

No. 315. October Term, 1949.

AMERICAN EASTERN CORPORATION,
Petitioner,

v.

JEREMIAH McCARTHY,
Respondent.

PETITION FOR REHEARING FOLLOWING DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petition of American Eastern Corporation respectfully prays that this Court shall reconsider its decision handed down November 7th, 1949 [1] denying the original petition for certiorari in the within matter. The Petitioner asks this Court to grant certiorari to review the judgment of the Court of Appeals for the Third Circuit which affirmed a judgment, entered upon the verdict of a jury, against your Petitioner in the sum of $22,500.00 in a suit for personal injuries against your Petitioner by the Respondent.

The question presented was the interpretation of a Federal Statute, 46 U. S. C. A. 688, commonly known and referred to as the Jones Act. More particularly it was whether the words "may at his election maintain an action at law for damages" in that statute did not require the Respondent to elect between his remedies under the Act and his remedy under the General Maritime Law for alleged breach of the warranty of seaworthiness.

[1] An order extending the time to file this petition for rehearing to December 15, 1949 was entered by Mr. Justice Burton on November 18, 1949.

In our original Petition we fear that we did not sufficiently emphasize the importance of the holding by the Court below. We failed to point out that the question of election under the Statute is one which is important not only to parties situated as is the Petitioner, the owner and operator of an American Vessel. It is of transcending importance to the seamen who man all of the ships of the American Merchant Marine. It vitally affects the uniformity of the remedy which these seamen may obtain. Without question the rule in the Second Circuit is that a seaman suing his employer must, at some time before concluding his case, elect between the remedy which the Jones Act grants him to recover for negligence and the remedy which is his by reason of claimed unseaworthiness.

The rule in the Second Circuit is set out in *Skolar v. Lehigh Valley R. Co.*, 60 F. 2nd 893. That case too involved a seaman suing his employer. There the District Court compelled the seaman to elect between those allegations of his complaint relating to unseaworthiness and those allegations of his complaint which sounded in negligence under the Jones Act. There the seaman appealed. The Court of Appeals for the Second Circuit affirmed and held that the seaman could not present his case to the Jury upon both bases, unseaworthiness and negligence. The Court in that case held that under the statute he had to elect between these two "inconsistent" grounds for recovery.

The Opinion by the Court of Appeals in our case recognizes that its rule of "no election" is contrary to the rule of the Second Circuit compelling election. That recognition is no great concession to facts because the Second Circuit has recently indicated its reaffirmance of the doctrine of election in *McGhee v. United States*, 165 F. 2nd 287. There the Court said:

> "We do not mean that a seaman may go to trial on both causes of action (negligence and unseaworthiness) simultaneously, and recover upon one or the

other as the evidence turns out; we said the opposite in *Skolar v. Lehigh Valley R. Co.*, supra."

The Jones Act created for seamen a new cause of action and provided that this modified maritime law could be tried with a jury in the Common Law Courts. *Panama R. Co. v. Johnson*, 264 U. S. 375; *Pacific S. S. Co. v. Peterson*, 278 U. S. 130. Congress did not modify in any way the ancient rights which were the seaman's under the General Maritime Law as set out in this Court's decision in *The Osceola*, 189 U. S. 158. Thus the decision below gives to seamen rights based upon the General Maritime Law which the latter does not give to any other class whose rights are just as "maritime". Stevedores and passengers would be examples. Thus, without any act of Congress a seaman suing his employer for injuries due to unseaworthiness under the General Maritime Law may sue at law whereas a passenger injured in the same occurrence would have to sue in admiralty.

If the latter statement is doubted we refer this Court to *Guerrini v. United States*, 167 F. 2nd 352, where the Court of Appeals for the Second Circuit states in so many words that the employee of someone other than the shipowner who is injured on board the ship must sue in the admiralty if he wishes to take advantage of the admiralty doctrine of unseaworthiness. In the *Guerrini* Case, *supra*, the Court clearly indicated that the law of the State (New York) within whose territorial waters the accident occurred would govern if the suit was in a State Court or upon the civil side of the Federal Court. It said:

> "We held in *Puleo v. H. E. Moss Co.*, 159 F. 2nd 842, that the employee of a sub-contractor engaged in freeing a tanker's piping of gasoline was in the position of a 'business guest', and that the shipowner's liability depended upon the law of New York, the ship being moored to a wharf in this port. In *Riley v. Agwilines, Inc.*, 296 N. Y. 402, 73 N. E. 2d 718, the Court of Appeals of New York pointed out that in so

holding we had ignored several decisions of the Supreme Court which, following *Southern Pacific Co. v. Jensen,* 244 U. S. 205, had held that in cases closely parallel the law of the sea displaced the local law. Whether those decisions are still law depends upon what is left of the whole doctrine of *Southern Pacific Co. v. Jensen, supra,* which has proved to the last degree difficult in application, even in the field of workmen's compensation where it arose. The Supreme Court had for long obviously continued to recognize it at all only with mounting reluctance, *Just v. Chambers,* 312 U. S. 383; *Parker v. Motor Boat Sales Co.,* 314 U. S. 244; *Davis v. Department of Law,* 317 U. S. 249."

Continuing with the same thought in the same Opinion, the Court of Appeals in the *Guerrini* Case said:

"As we said in that case, the New York decisions appear not to distinguish the measure of care due to a 'business guest' from that due from his employer to an employee; and, if so, a failure to use reasonable care to provide for the 'guest's' safety is a breach of duty, even though the danger be apparent. At times opinions have read as though the duty was limited to pointing out the dangers and not including any affirmative provision for the safety of the 'guest' while on the premises. It is not surprising that this ambiguity should arise, because practically it makes no difference, since even though the owner's duty be the broad one, contributory negligence or assumption of risk is an absolute bar. *However, in a suit in the admiralty the distinction becomes important,* because if the shipowner owes a positive duty to provide a safe place, regardless of the openness of the danger, the 'guest's' contributory negligence is not a bar, but only goes in mitigation of damages. This is as true when no statute so provides as when one does. *Moreover, whether the*

defense is total or partial, depends upon the forum.[16] (Emphasis ours.)

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[16] *Atlee v. Union Packet Company,* 21 Wall. 389, 395, 396, 22 L. Ed. 619; *Belden v. Chase,* 150 U. S. 674; *Johnson v. United States Shipping Board Emergency Fleet Corporation,* 24 F. 2nd 963; *In re Pennsylvania R. Co.,* 48 F. 2nd 559, 565, 566."

We respectfully point out to this Court that in the *Guerrini* Case the Second Circuit has reaffirmed the doctrine of *Belden v. Chase, supra,* and other cases cited in footnote 16 of the *Guerrini* Opinion.

So long as Courts cite *Belden v. Chase, supra,* there is confusion as to whether a suit instituted in a state court upon a cause of action which arose upon navigable waters is controlled by the rules of admiralty or the common law rules. So long as Courts say "in a suit *in the admiralty* the distinction becomes important" there is no uniformity of understanding as to the rule which applies. The Court of Appeals for the Third Circuit has treated the case at bar in a manner altogether different from the treatment the same case would have received in the Second Circuit, and the State Courts of New York, California, (*Vargas B. Pope & Talbot, Inc.,* 1948 A. M. C. 904) and Washington, (*Wilkins v. Foss Launch and Tug Company,* 1944 A. M. C. 759). Judging from the rationale of decisions, it was treated differently in the Third Circuit than it would have been in the Fifth, *Smith v. Lykes Bros.-Ripley S. S. Co.,* 105 F. 2nd 604, and the First Circuit, *McDonald v. Cape Cod Trawling Corporation,* 71 F. Supp. 888.

The Respondent in the case at bar was suing upon the civil side of the District Court because the Jones Act gave him the right to do so. He also had the right, under the Judicial Code, to pursue in that Court his "common law remedy". That does not mean he could pursue his admiralty remedy in the common law court unless this Court is prepared to say that the right to recover damages for

unseaworthiness is a "common law remedy". Cf. *Caldarola v. Eckert*, 332 U. S. 155.

In the original Petition and brief filed in this case we cited and relied heavily upon *Pacific S. S. Co. v. Peterson*, 278 U. S. 130. In No. 452, this term, McCarthy, the Respondent in the case at bar, has himself asked for certiorari on another phase of this same case. McCarthy's entire Petition is based upon the proposition that the Court below failed to apply the doctrine of the *Peterson* Case properly. So we have a situation where opposing parties both cite and rely upon a decision by this Court in support of diametrically different legal concepts. We respectfully suggest that when such a situation as this arises the time is ripe for this Court to bring the matter before it and decide the rule of law to be followed. The legal principle and its effect upon the rights of seamen and their employers throughout the Country transcends the importance of the particular case. We respectfully suggest that whether Mr. McCarthy, the Respondent here, may have to try his case a second time is by no means as important as that seamen and their employers everywhere shall know whether their rights are different in Pennsylvania than they are in New York or whether the seaman who is fortunate enough to be able to invoke Federal Jurisdiction as to both negligence and unseaworthiness has rights different from the seaman who cannot invoke Federal Jurisdiction as to unseaworthiness because of lack of diversity. We respectfully submit that because the Respondent here may eventually recover a verdict anyway and that some might even regard the point as moot should not militate against review by this Court. This is so because the Court of Appeals has reaffirmed a rule of law which sets the Federal Courts within the third circuit apart from other State and Federal Courts where seamen's personal injury suits are most often tried. The Court below having reviewed the problem we submit that this Court should review it for the reasons herein together with those set out in the original Petition.

The Principle of Southern Pacific Co. v. Jensen, Supra, Was Reaffirmed by the Decision Below Even Though This Court Has Said That It "Has No Vitality Beyond That Which May Continue as to State Workmen's Compensation Laws.[2]

This Court has restricted the doctrine of the *Jensen* Case in *Just v. Chambers,* 312 U. S. 383; *Parker v. Motor Boat Sales, Inc.,* 314 U. S. 244; *Davis v. Department of Labor and Industries of Washington,* 317 U. S. 249; and *Standard Dredging Corporation v. Murphy,* 319 U. S. 306. The *Jensen* Case arose when an attempt was made to apply a State Workmen's Compensation Act to an injury which occurred upon navigable water. For the first time this Court then promulgated the doctrine of uniformity. Events subsequent to Jensen indicate rather clearly that the doctrine which arose in a workmen's compensation case applied to every piece of litigation having any basis whatever in matters maritime. It has often been suspected by the Bench and Bar that the *Jensen* Doctrine is something which, like the family skeleton, was best ignored whenever possible. When it was impossible to ignore it a series of judicial amputations was performed upon it until Mr. Justice Black, for an unanimous Court, said that it had no vitality beyond its application to the compensation laws.[2]

It is plain from the *Guerrini* Decision that the Court of Appeals for the Second Circuit has, as we submit it should, interred the *Jensen* Decision. Yet the Court of Appeals for the Third Circuit necessarily followed *Jensen* when it held that the Respondent's cause of action for damages based upon unseaworthiness was justiciable upon the civil side of a Federal District Court as part and parcel of a case based upon the Jones Act. Certainly the *Jensen* Case should not be permitted to remain in the reports side by

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[2] *Standard Dredging Corporation v. Murphy,* 319 U. S. 306.

side with *Belden v. Chase, supra.* Able Judges (Holmes, Pitney, Brandeis and Clarke) dissented in *Jensen* and thereafter frequently noted their disapproval of its doctrine.

It requires only an examination of the cases decided prior to the Merchant Marine Act of 1915, to find that all causes of action by seamen or others against shipowners were cases where the admiralty jurisdiction of the Federal Court had been invoked.

The representatives of the seamen's unions who introduced the Jones Act in the United States Senate and testified in support of its passage had no desire that both possible causes of action should be tried together. They wanted to give the seaman the right to elect so as to avoid the result which had occurred in *Chelentis v. Luckenbach Steamship Company, Inc.*, 247 U. S. 372. There the suit had been upon the law side and the injured seaman had been denied recovery. The representatives of the seaman desired to have his remedy for unseaworthiness in admiralty and his Jones Act remedy upon the civil side *when he so elected.* See HEARINGS BEFORE THE COMMITTEE ON COMMERCE, UNITED STATES SENATE, 66th CONGRESS, FIRST SESSION, page 1709, STATEMENT OF ANDREW FURUSETH and HEARINGS BEFORE THE COMMITTEE ON MERCHANT MARINE AND FISHERIES, HOUSE OF REPRESENTATIVES, 64th CONGRESS, 2nd SESSION, PAGE 42, STATEMENT OF SILAS B. AXTELL.[3]

Conclusion.

We realize how infrequently this Court grants rehearing after it has once denied certiorari. We fear that in our desire for brevity in our original Petition we failed to point out to the Court the fundamental and great importance of the question which this case presents to the problem of securing uniformity in causes of action having

[3] For the convenience of the Court the excerpts from the Committee Hearings to which we refer are printed as an Appendix to this Petition.

their roots in Maritime Law. We respectfully point out to this Court that even the decision which we ask this Court to review recognizes that there is conflict between the Circuits and that the very able counsel representing the Respondent inferentially conceded as much and filed no brief in opposition to our Petition. In fact this Respondent, seeking certiorari on another phase of this same matter, No. 452, this term, cites in support of his own Petition the same cases which the Petitioner and the Court below rely upon in concluding that the decision by the Court of Appeals in this case is in conflict with prior decisions of this Court.

We respectfully urge this Honorable Court to reconsider its Order of November 7th, 1949 denying certiorari. We urge that it grant certiorari and bring the case on for hearing so that this Court may bring order out of what is now conflict and chaos in the lower Courts.

Respectfully submitted,

THOMAS E. BYRNE, JR.,
Counsel for Petitioner.

TIMOTHY J. MAHONEY, JR.,
KRUSEN, EVANS & SHAW,
Of Counsel.

I hereby certify that the within Petition for Rehearing is filed in good faith and not for purposes of delay.

THOMAS E. BYRNE, JR.,
Counsel for Petitioner.

APPENDIX.

UNITED STATES SENATE HEARINGS.

ESTABLISHMENT OF A MERCHANT MARINE.

Hearings before the Committee on Commerce, United States Senate, Sixty-Sixth Congress, First Session

Friday, February 27th, 1920

Wesley L. Jones, Presiding

Statement of Mr. Andrew Furuseth, p. 1709.

"MR. FURUSETH: There is another section to this, the amendment section. § 10 of the Seamen's Act provides that in any suit to recover damages for any injury sustained on board vessels or in its service, seamen having command shall not be held to be fellow servants with those under their authority. The Superior Court in the Chelentis Case held that that was meaningless because it had reference to the common law, and the common law had no jurisdiction on board a ship, and so, we will have to, after fifteen years of following the common law, in this decision we have got to change all that, and now here is the Supreme Court decision in the case of Chelentis v. The Luckenbach Steamship Co. (Inc.)"

(Here follows text of Opinion, 247 U. S. 372.)

At p. 1712—continued

"THE CHAIRMAN: What is the amendment you suggest to § 20?

MR. FURUSETH: That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the

right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply. And in the case of the death of any seaman as the result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. That is the amendment.

SENATOR FLETCHER: In other words, under the common law if a sailor should step through an open hatch that had been left carelessly open, he would have no remedy?

MR. FURUSETH: He would have no remedy.

SENATOR FLETCHER: And now you want to change that so he would have a remedy, provided his own negligence did not bring about the injury?

MR. FURUSETH: That is it exactly.

SENATOR CHAMBERLAIN: The fellow servant doctrine does not apply to that?

SENATOR NELSON: Does that law abolish the fellow servant's rule?

SENATOR CHAMBERLAIN: It does not exist in admiralty, I think.

SENATOR NELSON: And does it abolish the assumption of risk?

SENATOR FLETCHER: I think it does.

SENATOR NELSON: The assumption of risk in the fellow servant's rule goes to the vital rules.

SENATOR FLETCHER: Yes.

MR. FURUSETH: With those two, § 4 and § 11, it puts it straight if we can get §§ 13 and 14 enforced—and there is

some hope of it now, I suppose; we have got a new Secretary of Commerce. We have now got some hope of it.

SENATOR NELSON: I would suggest to your amendment to § 20 in line 17 that you transpose the words "at law" and have them inserted after action, so it would read "maintain an action at law for damages".

MR. FURUSETH: Well, that is all right.

SENATOR NELSON: Instead of an action for damages at law.

MR. FURUSETH: Of course, that is a matter to take care of, that § 20 there to take care of seamen after they are on board of a vessel."

PERSONAL INJURY SUITS BY SEAMEN.

Hearings before the Committee on Merchant Marine and Fisheries, House of Representatives,

Sixty-Fourth Congress, Second Session
on
H. R. 8916, H. R. 12454

May 5th, 1936

Silas B. Axtell, p. 42.

"THE CHAIRMAN: When you refer to the Jones Act, will you please be a little more specific?

MR. AXTELL: We refer to the Railway Servant's Act. It is the same Railway Servant's Act that was passed in 1904, declared unconstitutional, amended, and sustained by the Supreme Court in the *Railway Servant's Act Cases* in 1906; by the Chelentis Decision of the Supreme Court in 1917, on § 20 of the Seamen's Act, in which they said that Congress had voted to effect the remedy sought. The Jones Act was passed. Mr. Justice Sutherland, then ex-Senator from Utah, was counsel to the seamen, acting gratuitously as adviser, of course. And even the right of a jury trial was in jeopardy. As one of counsel, I insisted upon the writing in of the words that the seaman should have the right of election of a jury trial which has been the cause of considerable confusion on the part of judges since then; but its origin will be found in the decision of the Circuit Court of Appeals of the Third Circuit, in the case of *Berg v. Philadelphia Railroad,*[4] decided about 1919."

[4] 266 F. 591, affirmed 274 F. 534, cert. den. 257 U. S. 638.